

# THE EUROPEAN LEGACY OF *BROWN* v. *BOARD OF EDUCATION*<sup>†</sup>

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*The U.S. Supreme Court's decision in Brown v. Board of Education has influenced civil rights and antidiscrimination laws beyond the borders of the United States. The concept of equal protection from Brown and other American precedents has been a crucial stimulus for legal development in Europe. However, these precedents have operated in very different ways in the United States and in Europe. They have been reconstructed and in some cases transformed to fit the different social and political milieu of the European countries. This lecture examines such reconstruction using three illustrations: (1) the recognition of unintentional indirect discrimination; (2) the proof of direct discrimination; and (3) the development of positive duties on public authorities to promote equality of opportunity. There are a number of reasons for the divergences between the two continents. First, there are profoundly different contexts of racial disadvantage in the United States and in Europe. Second, racial classifications tend to be less entrenched in European countries than in the United States. Finally, European countries have recognized positive social, economic, and cultural obligations on the state. Thus, the globalization of law and the transplant of legal ideas into various countries actually creates differences between legal institutions, and these differences will continue to grow in the future.*

## INTRODUCTION

In the many commentaries to mark the fiftieth anniversary of *Brown v. Board of Education*,<sup>1</sup> there was little, if any, reference to the influence of the Supreme Court's decision and of the Civil Rights Act of

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1. 347 U.S. 483 (1954).

1964 on the development of civil rights and antidiscrimination law outside North America.

I hope to correct that omission. I shall focus on Britain and the other Member States of the enlarged European Union (EU). All of these States are bound by (relatively strong) EU treaty provisions and framework laws which require equal treatment,<sup>2</sup> and have also ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), an instrument of the Council of Europe, which contains a (relatively weak) nondiscrimination provision.<sup>3</sup> I shall argue that while the concepts of equal protection and nondiscrimination borrowed from *Brown* and other American cases and legislation were important in stimulating legal change in Europe, these concepts have in fact operated in different ways in the U.S. and in Europe. I shall use the transplantation of American civil rights law as a basis for considering Gunther Teubner's thesis, according to which transplants may act as "legal irritants." In Teubner's words, transplants "unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change."<sup>4</sup> This theory rejects the ideas that different legal systems are converging and that different legal institutions have "functional equivalence," or doctrinal solutions that serve the same function. Instead of this, argues Teubner, transplants produce new differences. Globalization of law—including the law on human rights—encourages differences, not convergence.

At the outset I must make a confession. My attitude toward *Brown* has been shaped by personal experience. At the time the decision was handed down, I was a third-year student at the University of the Witwatersrand, which was facing the threat of being forced by the *apartheid* Government to close its doors to Black students. As President of the Students' Representative Council, I was also locked in a battle with the University authorities over their policy of racial segregation of certain facilities within the University campus.<sup>5</sup> For most white South Africans at the time, Jim Crow laws in the Southern states showed that South Africa

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2. This began with freedom from discrimination on grounds of nationality against citizens of the EC (now EU), and the right of women and men to equal remuneration (Art. 119 of the EC Treaty, now Art. 141). The European Court of Justice (ECJ) developed these into fundamental rights, and the EC itself adopted a series of directives (framework laws) in respect of equality, gender, and later (under Art.13 EC Treaty inserted by the Treaty of Amsterdam 1997), discrimination on grounds of race, religion or belief, sexual orientation, and disability. See M. BELL, *ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION* (2002).

3. Art.14 reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 232 [hereinafter ECHR].

4. G. Teubner, *Legal Irritants: How Unifying Law ends up in New Divergences*, in *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 418 (P. Hall & D. Soskice eds., 2001).

5. See BRUCE K. MURRAY, *WITS: THE 'OPEN' YEARS 298-321* (1997).

was not unique in enforcing racial segregation. The American example was frequently trotted out to legitimize centuries-old white domination, then being crystallized into legislative *apartheid*, the segregation of transportation, public places, post offices and education, the barring of mixed marriages and the penalizing of sexual relations across the color line.<sup>6</sup>

In 1952, the African National Congress (ANC) launched its campaign, led by Nelson Mandela, in defiance of segregation laws. The Government responded by prosecuting the leaders and imposing severe penalties on those taking direct action. This was a crucial moment in what Mandela called the “long walk to freedom.”<sup>7</sup> When the news of the Supreme Court’s decision in *Brown* reached South Africa, those of us who had allied ourselves with the ANC’s campaign were enormously excited. This, we were sure, was the beginning of an “egalitarian revolution”<sup>8</sup> in the United States which would spread around the globe, even to South Africa, which was then entering upon the darkest period in its history. But *Brown* soon faded into a distant foreign mirage. It took another forty years of violent struggle in South Africa, and external pressure, before the dream of equal civil and political rights was realized in the new South African Constitution and the first democratic elections of 1994.

My active involvement in the anti-apartheid struggle and my position as a lawyer assisting Mandela and others forced me into exile in Britain in 1963. There, I again turned to *Brown* and the growing body of U.S. antidiscrimination law. Soon after my arrival in Britain, I was invited to address a trade union branch at a London bus depot on behalf of the anti-apartheid movement. The branch pledged its support for Black trade unionists in South Africa, but then went on, as the very next item of business, to approve a motion opposing the introduction of “colored” (i.e., Afro-Caribbean and Asian) bus staff in London. These British similarities to the attitudes of white South Africans led me to become involved in community relations and the antidiscrimination movement in Britain. This experience also prompted me to research and write the first book of its kind on racial discrimination and the law in Britain.<sup>9</sup>

### *Transplantation*

The British Race Relations Act of 1965 outlawed racial discrimination in public places<sup>10</sup> and was extended in 1968 to cover employment,

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6. For a contemporary account, see B. Hepple, *Economic and Racial Legislation*, in THE UNION OF SOUTH AFRICA 793–813 (H.R. Hahlo & E. Kahn eds., 1960).

7. NELSON MANDELA, LONG WALK TO FREEDOM 119 (1994).

8. The description given by P.G. POLYVIU, THE EQUAL PROTECTION OF THE LAWS 345 (1980).

9. BOB HEPPLE, RACE, JOBS AND THE LAW IN BRITAIN (2d ed. Penguin 1970).

10. ANTHONY LESTER & GEOFFREY BINDMAN, RACE AND LAW IN GREAT BRITAIN 258 (1972).

provision of services, education and housing.<sup>11</sup> The legislation was modeled in part on North American-style administrative enforcement of antidiscrimination legislation by Fair Employment Practice (FEP) Commissions and the Equal Employment Opportunity Commission (EEOC). The Race Relations Board was given power to investigate complaints, but (under the 1968 Act) only the Board could bring legal proceedings. There was no equivalent of the rights of individuals under American legislation to bring antidiscrimination suits. This was changed by the third Race Relations Act in 1976, which established the Commission for Racial Equality (CRE), on which I served in the 1980s. Individuals were given the right to bring proceedings for compensation for unlawful discrimination in county courts (sheriff courts in Scotland) or, in employment cases, in the industrial (later renamed employment) tribunals. Strategic enforcement in the public interest was entrusted to the CRE, which also had the power to assist individuals. There was a separate Equal Opportunities Commission (EOC) to deal with gender inequality and, much later, a Disability Rights Commission (DRC). Under legislation proposed in 2005, all these commissions are to be merged by March 2009 into a single Commission for Equality and Human Rights (CEHR), which would enforce a single Equality Act covering discrimination on grounds of race, gender, disability, sexual orientation, religion and belief, and age.

The *Brown* decision was embodied in the definition of discrimination as less favorable treatment on racial grounds. It was declared that “segregating a person from other persons on racial grounds is treating him less favorably than they are treated.”<sup>12</sup> The 1976 Act, which with amendments is still in force, was also heavily influenced by the U.S. Supreme Court: the then Labour Home Secretary, Roy Jenkins, and his special adviser, Anthony Lester (now Lord Lester of Herne Hill QC), consulted U.S. experts about the principles on which British legislation should be based.<sup>13</sup> In particular, Dean (now Judge) Louis H. Pollak drew attention to *Griggs v. Duke Power Co.*,<sup>14</sup> construing the Civil Rights Act as covering not only “overt” discrimination, but also “practices that are fair in form but discriminatory in operation.”<sup>15</sup> This concept of “adverse

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11. *Id.* at 153. The Street Report on Anti-Discrimination Legislation by H. Street, G. Howe and G. Bindman (Political and Economic Planning, 1967), brought the North American experience directly to the attention of those framing the legislation, although a number of compromises were made which meant that the Race Relations Act 1968 did not measure up to North American standards. *Id.* at 98–106; see HEPPLE, *supra* note 9, at 168.

12. Currently Race Relations Act, 1976, c.74 § 1(2) (Eng.). There is no similar provision in the EU Race Directive, Council Directive 2000/43, 2000 O.J. (L 180/22), but it is likely to be interpreted to cover segregation on racial grounds.

13. For this history, see Anthony Lester QC, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 547–57 (1988); Lord Lester of Herne Hill QC, *Equality and United Kingdom Law: Past, Present and Future*, 2001 Pub. L. 77, 88.

14. 401 U.S. 424 (1971).

15. *Id.* at 431.

impact” or “indirect” discrimination was embodied first in the Sex Discrimination Act of 1975 and then in the new Race Relations Act.<sup>16</sup> The concept was later borrowed by the European Court of Justice (ECJ) when construing the prohibition in the European Community (EC) Treaty on discrimination between women and men in matters of remuneration,<sup>17</sup> and is now embodied in the European Union’s laws on racial equality<sup>18</sup> and on discrimination in employment on grounds of gender, sexual orientation, religion or belief, and disability.<sup>19</sup>

American precedents were frequently cited in early British and EC cases interpreting antidiscrimination laws. They also affected the development and interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Brian Simpson remarks that, although both the French and the Americans would claim that they invented human rights, every respectable British constitutional historian would say that their ideas were derived from English constitutional thought, owing much to John Locke and William Blackstone, but then Blackstone was influenced by Montesquieu.<sup>20</sup> The “rights of man” or “civil rights” are a common inheritance of humanity. However, the place and meaning of equality in the scheme of human rights has always been problematic. As many authors have pointed out, the decision in *Brown* to overrule the “separate but equal” precedent of *Plessy v. Ferguson*<sup>21</sup> was far from inevitable.<sup>22</sup> The ambiguous equal protection clause in the Fourteenth Amendment does not plainly exclude segregation.

The drafters of the ECHR were also equivocal. The Convention, negotiated in 1949–50, contains no equal protection clause. Nor is there any free-standing right against discrimination. The dilemma that this creates for victims of discrimination is illustrated by the *East African Asians* case.<sup>23</sup> The United Kingdom enacted the Commonwealth Immigrants Act of 1968 to provide that British citizens would be free of immi-

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16. See Sex Discrimination Act, 1975, c.65 §(1)(b) (Eng.); Race Relations Act, 1976, c.74, § 1(1)(b) (Eng.).

17. Case C-170/84, *Bilka-Kaufhaus GmbH v. Weber von Hartz*, 170/84, 1986 E.C.R. I-1607.

18. Council Directive 2003/43, art. 2(2)(b), 2000 O.J. (L 180/22): “Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

19. Council Directive 2000/78, art. 2(2)(b), 2000 O.J. (L 303/16) (EC) (with modifications in regard to disability).

20. A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 19–20* (2001).

21. 163 U.S. 537 (1896).

22. DERRICK BELL, *SILENT COVENANTS: BROWN V BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 20–28 (2004); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 446 (2004); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 565–85, 590 (1976).

23. *East African Asians v. United Kingdom*, 3 Eur. H.R. Rep. 76 (1973). See generally Lord Lester of Herne Hill QC, *Thirty Years On: The East African Asians Case Revisited*, 2002 Pub. L. 52.

gration control only if they, or at least one of their parents or grandparents, were born, naturalized, or adopted in the United Kingdom. This was neutral on its face, but racially discriminatory in its intent and effect. The intention was to exclude up to 200,000 United Kingdom passport holders who had opted to retain British citizenship when the U.K.'s former East African dependencies became independent in the early 1960s. These British Asians had become victims of the policy of Africanization, and they started emigrating to the U.K. in growing numbers, partly because of the justifiable fear that if they waited the doors of the British Isles would be closed to them. The 1968 Act—a crude response to a racist campaign against these brown British citizens—could not be challenged in the courts of the United Kingdom because of the doctrine of parliamentary supremacy.<sup>24</sup> So, they complained to the European Commission on Human Rights that there had been a violation of their rights under the ECHR.

As mentioned above, Article 14 of the ECHR, prohibiting discrimination on racial and other grounds, provides no more than a “complementary” right.<sup>25</sup> Unlike the equal protection clause in the Fourteenth Amendment to the U.S. Constitution, it is not a general guarantee of equal treatment without discrimination. A complaint of discrimination can be sustained under the ECHR only if the facts of the case fall within the ambit of one of the substantive Convention provisions (e.g., freedom of speech, freedom of association, the right to respect for family life, and the right to education), and there is different treatment of individuals on one of the prohibited grounds, without objective and reasonable justification. The U.K. Government relied heavily on the fact that there is no Convention right to enter and live in the country of one’s nationality, and the U.K. had also not ratified the Fourth Protocol to the ECHR which recognizes such a right. Fortunately, Anthony Lester, counsel for a group of these citizens, advised by the American Professor Charles Black, was able to persuade the Commission that racial discrimination is inherently degrading and hence contrary to the prohibition against degrading treatment contained in Article 3 of the ECHR.<sup>26</sup> He did so on the basis of the U.S. Supreme Court’s decision in *Strauder v. West Vir-*

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24. This has now been modified by the Human Rights Act 1998, which allows the High Court to grant a declaration of incompatibility of primary parliamentary legislation with the ECHR. It is then for Parliament to decide whether or not to amend the legislation, so the fiction of parliamentary sovereignty is maintained. In the greatest test so far, the Belmarsh detainees case, *A v. Sec’y of State for Home Dep’t* [2005] 2 W.L.R. 87, HL (Eng.), Parliament accepted the House of Lords’ declaration that derogations from the ECHR by the U.K. allowing detention without trial of foreign suspected terrorists were discriminatory and disproportionate, contrary to the ECHR. Less draconian and nondiscriminatory legislation providing for ‘control orders’ against suspected terrorists whatever their origins was enacted. See *Prevention of Terrorism Act 2005, c.2*.

25. ECHR, *supra* note 3. Protocol No.12 to the ECHR, establishes the right to nondiscrimination as an independent right. The U.K. refuses to sign or ratify this Protocol.

26. *Id.* at art. 3; see Lester, *supra* note 23, at 57–60.

*ginia*<sup>27</sup> and Justice Harlan's famous dissenting opinion in *Plessy v. Ferguson*.<sup>28</sup> The Commission accepted that the Commonwealth Immigrants Act constituted an interference with the complainant's human dignity and amounted to degrading treatment covered by the Convention.<sup>29</sup> The Commission's words echo those of Chief Justice Warren in *Brown*, who wrote, "[T]o separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>30</sup> The European Commission on Human Rights wrote that, "publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity."<sup>31</sup> This is now firmly entrenched in the case law under the ECHR. For example, in July 2005, the European Court of Human Rights ruled that racial discrimination to which a Roma community in Romania was publicly subjected, including the way in which their grievances were dealt with by various public authorities, constituted an interference with their human dignity amounting to "degrading treatment" within the meaning of Article 3 of the ECHR.<sup>32</sup>

### *Reconstruction*

It is obvious from this brief account that American precedents and legislation have been a crucial stimulus to legal development in Europe. I now want to show how the borrowed concepts have been reconstructed, and in some cases transformed, in the European milieu. I shall use three illustrations: (1) the recognition of unintentional indirect discrimination under the ECHR; (2) the proof of direct discrimination; and (3) the development of positive duties on public authorities to promote equality of opportunity.

#### *1. Unintentional Disparate Impact/Indirect Discrimination*

I start with what in the United States is called disparate impact, and in Europe, indirect discrimination. This is now well-recognized in EU

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27. 100 U.S. 303 (1880).

28. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

29. *East African Asians v. United Kingdom*, 3 Eur. H.R. Rep. 76, para. 207–8 (1973). The Commission expressly confirmed the reasoning in the *East African Asians* case in the inter-state case of *Cyprus v. Turkey*, App. No. 25781/94, 4 Eur. H.R. Rep. 1, 207–08 (2001) (Commission Report) and in other cases. Those applicants who had been separated from close relatives as a result of the ban on entry in the *East African Asians* case also successfully relied on the right to family life under Art.8 of the ECHR.

30. 347 U.S. 483, 494 (1954).

31. 3 Eur. H.R. Rep. 76, para. 207 (1973). The U.K. Government accepted the ruling. It did not restore full rights to these citizens, but accelerated their rate of entry into the country.

32. *Moldovan and Others v. Romania*, App. Nos. 41138/98 and 64320/01, ¶¶ 113–14, (2005) (Eur. Ct. H.R.), <http://www.echr.coe.int/engechr>.

law, as it focuses on the impact or effect of measures against particular groups and not on an intent to harm. However, this concept is still in the process of development by the European Court of Human Rights (the Strasbourg Court) in respect to the ECHR. The issue whether, and to what extent, Article 14 of the ECHR extends to indirect discrimination is central to the highly important *Ostrava Schools* case, recently declared admissible by the European Court of Human Rights (the Strasbourg Court).<sup>33</sup> The case is different from *Brown* in that it is concerned not with direct racial segregation by law, but with de facto racial segregation. The applicants are school children who are Czech citizens of the Roma ethnic group. They are assisted by the European Roma Rights Center (ERRC) (of whose Board I am Chair). Voluminous and compelling evidence has been presented showing that they have been wrongly and disproportionately placed in special schools for the mentally handicapped, which offer markedly inferior education and reduced educational and employment opportunities. According to the Council of Europe's Commissioner for Human Rights,

The young members of the Roma/Gypsy community are drastically over-represented in "special" schools and classes for children suffering from slight mental disability. Some figures produced indicate that 70% of all Roma/Gypsy children present in Czech territory are placed in these schools; while children from this community make up less than 5% of primary age pupils; they reportedly form 50% of the special school enrolment.<sup>34</sup>

In 2000, a Czech Government representative conceded to the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD) that "[l]ess than 3% of Czech pupils attended special schools, although the majority of Roma children did."<sup>35</sup>

The "serious question of fact and of law" that the Strasbourg Court has agreed to consider is whether Roma children have been victims of racial discrimination in the enjoyment of their right to education (Article 14 read with Article 2 of Protocol 1).<sup>36</sup> This raises several complex problems that have tested equal protection jurisprudence and the power of the courts to remove de facto segregation in the United States. As is well-known, in *Washington v. Davis* the Supreme Court held that, under the equal protection clause as distinct from Title VII of the Civil Rights

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33. *D.H. and Others v. Czech Republic*, App. No. 57325/00 (2005) (Eur. Ct. H.R.) (decision on admissibility).

34. Council of Europe, Office of the Comm'r for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the Czech Republic from 24 to 26 February 2003, for the attention of the Committee of Ministers and the Parliamentary Assembly*, (Oct. 15, 2003) available at [http://www.coe.int/t/e/commissioner\\_h.r/communication\\_unit/Documents/BCommDH\(2003\)10\\_E.pdf](http://www.coe.int/t/e/commissioner_h.r/communication_unit/Documents/BCommDH(2003)10_E.pdf).

35. Summary Record of the 1412th Meeting of the Committee on the Elimination of Racism: Czech Republic, U.N. CERD, 1412 mtg., para.14, U.N. Doc. CERD/C/SR.1412 (Aug. 12, 2000).

36. *D.H. and Others v. Czech Republic*, App. No. 57325/00 (2005) (Eur. Ct. H.R.) (decision on admissibility).



Act, a racially discriminatory purpose is required.<sup>37</sup> This narrow approach to the concept of discrimination is based principally on the view that de facto segregation which is not the result of state action is beyond the reach of the equal protection clause. In the *Ostrava Schools* case, the applicants seek to go beyond the American precedents by saying that Roma children have been unjustifiably differently treated from non-Romani children in the exercise of their substantive Convention right to effective education. Their claim is in essence one of indirect discrimination. Although the Czech laws on special schools are neutral on their face, these laws were operated in a way that had a disproportionate impact on Roma children, as they are twenty-seven times more likely to be placed in such schools than non-Romani children. The applicants claim that this is prima facie discrimination which the Czech Government must justify. The Czech Court, while acknowledging the persuasiveness of the applicants' arguments in this respect, found against them on a technicality.<sup>38</sup>

The Strasbourg Court has found that there was insufficient evidence in this case to pass the threshold of gravity required for "degrading treatment" contrary to Article 3 of the ECHR.<sup>39</sup> All they had shown was a general practice and that was not enough to denote "any disdain or lack of respect for the personality of the applicants and was at no time intended to humiliate or debase them."<sup>40</sup> Accordingly, the claim based on Article 3 was declared inadmissible.<sup>41</sup> The question that has been declared admissible, and will be subject of further hearing, is whether the concept of indirect discrimination should be applied to the interpretation of Article 14 in the context of de facto racial segregation in schools, without the need to prove racist motives.<sup>42</sup> Will the Strasbourg Court adopt the restrictive interpretation that the U.S. Supreme Court placed on the equal protection clause, or will it follow the precedents of the European Court of Justice (the Luxembourg Court)—the supreme judicial authority for the interpretation of the treaties establishing the European Community (EC) and the European Union (EU)—which do not require proof of intent? There are good reasons for the Strasbourg Court to go beyond the American equal protection precedents and to interpret Article 14 of the Convention consistent with EU law, so creating a unified European jurisprudence concerned with the impact of facially neutral practices having disproportionate effects.

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37. 426 U.S. 229 (1976).

38. The Court said that only particular applicants cases could be considered, not a pattern or practice, and that the applicants had not availed themselves of an administrative remedy. See Press Release, Justice Initiative, European Human Rights Court to hear Roma School Segregation Complaint (May 17, 2005).

39. *D.H. and Others v. Czech Republic*, App. No. 57325/00 (2005) (Eur. Ct. H.R.) (decision on admissibility).

40. *Id.*

41. *Id.*

42. *Id.* at 18.

## 2. *Proof of Disparate Treatment/Direct Discrimination*

A second area of European reconstruction beyond the confines of not only the equal protection clause, but also of Title VII, can be seen in the vital question of the proof of what in the United States is called disparate treatment and, in Europe, direct discrimination. Unlike American federal law, liability for direct discrimination (less favorable treatment on racial grounds) under British and EU law does not depend on establishing a discriminatory intent or purpose on the part of the alleged wrongdoer.<sup>43</sup> It is sufficient to show that but for the claimant's race, he or she would not have been differently treated.<sup>44</sup> The absence of a hostile intent or the presence of a benign motive for the differential treatment is irrelevant.

This is well illustrated by the recent landmark decision of the House of Lords (the U.K.'s highest court) in the case of *R. v. Immigration Officer at Prague Airport, ex parte European Roma Rights Center*.<sup>45</sup> The U.K. Government was concerned about the growing number of asylum seekers from the Czech Republic, the majority of them being Roma, seeking refuge from the oppression and violence they suffered in the Czech Republic. The U.K. reached an agreement with the Czech authorities that U.K. immigration officers would be stationed at Prague Airport to screen all travelers intending to travel to the U.K. An observer from the European Roma Rights Center testified, on the basis of observations on fifty-one different dates from January to April 2002, that intending Roma travelers were 400 times more likely to be turned away than non-Roma. He also observed that Roma travelers were questioned for longer than non-Roma, and that eighty percent of Roma were taken to a second interview while this happened to less than one percent of non-Roma. The evidence was that Roma citizens were treated with greater suspicion and subjected to more intensive questioning than non-Roma, and that the instructions and training given to immigration officers created a high risk that the Prague officers would treat the Roma less favorably than others. No evidence was produced by the Government to counteract this. The ERRC together with six Roma brought an application for judicial review to challenge the lawfulness of these procedures.

In the Court of Appeal, a majority of the judges found that the reason for the more intrusive questioning of Roma citizens was due to a well-founded belief on the part of the immigration officers that the Roma citizens would seek asylum.<sup>46</sup> Being subject to discrimination and persecution in their own country, it was said that they were more likely to lie

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43. See the line of cases from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

44. This has been established in the U.K. by decisions of the highest court, the House of Lords. See *Nagarajan v. London Reg'l Transp.*, [2001] A.C. 501; *Equal Opportunities Comm'n v. Birmingham City Council*, [1989] A.C. 1155 (discussing sex discrimination in a similar fashion).

45. [2005] 2 W.L.R. 1.

46. *R. v. Immigration Officer at Prague Airport and Another* [2004] Q.B. 811.

about their true intentions than non-Roma. The dissenting judge (Lord Justice Laws) said that by acting in this way the officers were applying a stereotype to all Roma citizens.<sup>47</sup> The fact that the stereotype may be true in an individual case, or that the immigration officer has an entirely proper reason or motive (his duty to refuse those without a claim to asylum under the rules), does not alter the fact that the Roma citizens were being treated less favorably than non-Roma citizens. In the absence of a specific defense or justification, the dissenting Judge said that there had been direct discrimination.<sup>48</sup> The majority, on the other hand, held that the only discrimination was indirect and that this was objectively justifiable.<sup>49</sup>

The five judges in the House of Lords unanimously upheld an appeal on this point, agreeing with the dissenting Judge in the Court of Appeal. In one of the two leading opinions, Baroness Hale (incidentally the first woman to be appointed to Britain's highest court) stated:

It is worth remembering that good equal opportunities practice may not come naturally. Many will think it is contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong . . . The inevitable conclusion is that the operation [at Prague Airport] was inherently and systematically discriminatory and unlawful.<sup>50</sup>

The evidence was clear in the *Prague Airport* case. It is, however, unusual to find such direct evidence of unlawful discrimination. This is why the EU Race Directive 2000/43/EC provides for a reverse burden of proof.<sup>51</sup> Where the claimant establishes facts from which it may be presumed that there may be discrimination, it is for the respondent to prove that there has been no unlawful treatment. As interpreted by the British courts, the claimant must establish primary facts from which, in the absence of an adequate explanation, inferences of secondary fact could be drawn and the court or tribunal could conclude that there has been unlawful discrimination.<sup>52</sup> The burden of proof then moves to the respondent to prove that he did not commit an unlawful act.<sup>53</sup> In order to discharge that burden, the respondent must show on the balance of probabilities that the treatment was in no sense based on race.<sup>54</sup>

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47. *Id.* at 847.

48. *See id.* at 846–47.

49. *Id.* at 841.

50. [2005] 2 W.L.R. 1 at 47.

51. Council Directive 2000/43, art. 8, 2000 O.J. (L 180/22) 22, 25.

52. *Igen Ltd. v. Wong, Chamberlin Solicitors v. Emokpae, Brunel University v. Webster*, [2005] Industrial Relations Law Reports, 258 (EWCA).

53. *Id.* at 270.

54. Compare the “mixed motive” cases in the United States, such as *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1985), under which the respondent can still win if it can prove by a “prepon-

The situation is somewhat different under the ECHR. As we have seen, Article 14 (nondiscrimination) is a complementary right only. It has to be shown that the differential treatment occurred within the ambit of some other Convention right. Thus, in one recent case of a pogrom against a Roma community in which local police participated, the racial element constituted an aggravating factor, clinching the argument that there had been “degrading treatment” contrary to Article 3.<sup>55</sup> The Strasbourg Court recognized that “racial violence is a particular affront to human dignity,” and this places a positive obligation on state authorities to combat racism and racist violence.<sup>56</sup> The Court has to decide whether or not racial discrimination was a causal factor giving rise to a breach of Article 14 taken in conjunction with another Convention right. In the past the Court has, rather confusingly, adopted the standard of proof “beyond reasonable doubt.” But in an important recent judgment, it made it clear that it was never its intention to borrow the approach of the national legal systems that use this standard, since the Court’s role is not to rule on criminal guilt or civil liability, but on whether there has been a violation of the Convention.<sup>57</sup> The Court has expressed its willingness to draw inferences, but so far it has lacked the sophistication of the approach taken by EU law and it has not reversed the burden of proof where there is evidence of a general picture of disadvantage, common knowledge of discrimination, and racially offensive language. The Grand Chamber of the Strasbourg Court has gone no further than to say that in certain limited circumstances—such as the death of a person in custody under police control—the burden of proof may be on the authorities to provide a satisfactory and convincing nondiscriminatory explanation.<sup>58</sup>

### 3. *The Development of Positive Duties to Promote Equality*

The quest for equality of opportunity through affirmative action has taken different routes in the United States and Europe. Indeed, on the eastern side of the Atlantic, the term “positive action” is generally used so as to avoid the controversial connotations of U.S.-style affirmative action, such as racial quotas and bussing. Under current U.K. legislation, racial preferences of any kind are not permitted.<sup>59</sup> There are limited exceptions in the field of employment, for example, allowing (but not requiring) certain positive measures to encourage applications and to pro-

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derance” of the evidence that it would have made the same decision even if race or gender had not played a role in the decision.

55. *Moldovan and Others v. Romania*, App. Nos. 41138/98 and 64320/01, at 25 (2005) (Eur. Ct. H.R.), <http://www.echr.coe.int/engechr>.

56. *Nachova v. Bulgaria*, App. Nos. 43557/98 and 345 79/98, slip op. at 30 (July 6, 2005), <http://echr.coe.int> (search “Nachova” under library link).

57. *Id.* at 31.

58. *Id.* at 40 (see the concurring opinion of Judge Sir Nicholas Bratza, who notes that the reasoning of the majority is too restrictive in respect of a reverse burden of proof).

59. See generally *Race Relations Act, 1976, c.74* (Eng.).

vide training.<sup>60</sup> Racial classifications are, however, excluded at the point of selection for employment or in school or university admissions.<sup>61</sup> Under EU law, it is possible for Member States to go further than the U.K. has,<sup>62</sup> but only the Netherlands appears to have done so.<sup>63</sup> The current limits on positive action under EU law are set in the somewhat vague provisions of Article 5 of the Race Directive 2000/43: “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.”<sup>64</sup>

It will be noted that this permits, but does not require, positive action by Member States. It is obvious that the “specific measures” have to be proportionate to the legitimate aim of preventing or compensating for racial disadvantage. Under the EU’s gender equality directive, case law has excluded schemes involving automatic preferential treatment for women at the point of selection for employment.<sup>65</sup> The reasoning of the European Court of Justice bears a remarkable similarity to Justice Sandra Day O’Connor’s opinion for the majority in *Grutter v. Bollinger*,<sup>66</sup> upholding the law school’s minority admissions policy. She described the policy in that case as a “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment” which was not used in a “mechanical” way.<sup>67</sup> As yet, no cases have reached the Luxembourg Court on the interpretation of the Race Directive, but it seems likely that a similar approach will be taken to that of Justice O’Connor.

There have, however, been major developments in the U.K. placing positive legal obligations on public authorities to ensure equality of opportunity for different racial groups when exercising their functions. In Northern Ireland, American pressure (through the MacBride Principles) induced the U.K. Government in 1989 to introduce positive duties on employers to achieve fair participation of the Roman Catholic and Protestant communities.<sup>68</sup> It is clear that this has had a significant impact. A parliamentary report in 1999 found that there was a high level of compli-

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60. *See id.* § 38.

61. *See id.* § 4.

62. Council Directive 2000/43, art. 5, 2000 O.J. (L 180/122).

63. Equal Treatment Act, 1994, § 2(2)–(5) (Neth.).

64. Council Directive 2000/43, art. 5, 2000 O.J. (L 180) 22.

65. *See, e.g.*, Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3069; Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363. *See generally* S. FREDMAN, *DISCRIMINATION LAW* 136–43 (2003).

66. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *see* Colin S. Diver, *From Equality to Diversity: the Detour from Brown to Grutter*, 2004 U. ILL. L. REV. 691 (2001).

67. *Grutter*, 539 U.S. at 337.

68. Fair Employment (Northern Ireland) Act, 1989, c.32. *See generally* Christopher McCrudden, *Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?*, 19 OXFORD J. LEGAL STUD. 167, 193–198 (1999).

ance among employers.<sup>69</sup> As a result, there have been significant reductions in employment segregation and in the unemployment differentials between the Catholic and Protestant communities. The Northern Ireland Act of 1998, implementing the Belfast or Good Friday Agreement between the political parties, introduced a general duty on all public authorities in Northern Ireland to have due regard for the need to achieve equality of opportunity in all spheres, not only employment.<sup>70</sup> Following the example of the Northern Ireland Act, the Race Relations (Amendment) Act of 2000 introduced a positive obligation on public authorities to have due regard for the need to ensure racial equality.<sup>71</sup>

This positive duty overcomes the inadequacy of indirect discrimination. The essential feature of the latter concept is that an apparently neutral provision has an unjustifiably disproportionate impact upon the racial group to which the claimant belongs. There is no violation if there is no exclusionary provision, a “particular disadvantage” cannot be shown, or if the practice can be objectively justified. Indirect discrimination only partially captures the many interacting factors which cause racial inequality. These include racism, i.e., beliefs in biological superiority; cultural beliefs about the incompatibility of certain lifestyles and traditions; divisions of social class and gender; and social space, i.e., the structure of opportunities which is molded by the geographical location in which communities live.<sup>72</sup> The positive duty obliges public authorities to monitor all their activities in order to gauge their racial impact and to develop a remedial strategy. But that strategy must fall short of overt racial preferences.

The inspiration for the idea of promoting fair participation is, once again, the United States, and in particular, President Kennedy’s Executive Order 10925, as amended by President Johnson’s Executive Order 11246.<sup>73</sup> These Orders require government contractors not merely to abstain from unlawful discrimination, but also to take positive measures to increase the representation of racial minorities in their workforces. In 1999 to 2000, Mary Coussey, Tufyal Choudhury, and I conducted an independent review of the enforcement of U.K. Anti-Discrimination Legislation under the auspices of the Cambridge Centre for Public Law and the Judge Institute of Management Studies.<sup>74</sup> As part of this review,

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69. NORTHERN IRELAND AFFAIRS COMMITTEE FOURTH REPORT: THE OPERATION OF THE FAIR EMPLOYMENT (NORTHERN IRELAND) ACT 1989—TEN YEARS ON, 1998–99, H.C. 95-I, at paras. 37, 48, 50–55.

70. Northern Ireland Act, 1998, c.47.

71. Race Relations (Amendment) Act, 2000, c.34, §§ 1.2 (Eng.). Similar obligations have been introduced in respect of disability (Disability Discrimination Act, 2005, c.13, § 33 (Eng.)) and the Government proposes to do the same in respect of gender equality (Equality Bill 2005).

72. See M. Cross, *Racism and Racial Inequality: the British Case in a European Context*, in CHALLENGING RACISM IN BRITAIN AND GERMANY 79 (Z. Layton-Henry & C. Wilpert eds., 2001).

73. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965).

74. BOB HEPPLE QC ET AL., EQUALITY: A NEW FRAMEWORK, REPORT OF THE INDEPENDENT REVIEW OF THE ENFORCEMENT OF UK ANTI-DISCRIMINATION LEGISLATION (HART PUBLISHING,

Mary Coussey conducted case studies of employers operating under three different legislative regimes: American employers, Northern Ireland employers, and British employers. She found that it was the obligation to ensure fair participation which had the most significant impact in changing organizational behavior.<sup>75</sup> We concluded that the strength of the contract compliance regime is the compulsion on contractors to ensure fair participation and the power of an expert independent body, the OFCCP, to enforce this obligation on the basis of the economic power of withdrawal of contracts.<sup>76</sup> The Northern Irish employers in our study were unanimous that the positive duties had made a fundamental difference to equal opportunities.<sup>77</sup>

The conclusion of our independent review was a detailed proposal to place every employer with more than ten employees under a positive duty to take action to ensure equality of opportunity.<sup>78</sup> To date, that proposal has not been implemented. The positive obligation is limited to the public sector; it includes public procurement, but goes well beyond this into the employment practices of large public employers, such as the National Health Service (the largest employer in Britain), central and local authorities, and a range of other institutions such as state schools and the universities. It applies as well to the provision of goods, services and facilities, housing, and procurement by public bodies. The significance of the new positive duty in Britain is that it shifts responsibility to generate changes onto organizations and individuals. It moves away from an adversarial court-based model which leads to defensive rather than responsive action. It recognizes that the achievement of racial equality depends not simply on avoiding negative discrimination, but on the active participation of all stakeholders, on training and improving skills, on developing wider social networks, and on encouraging adaptability. This was inspired by the U.S. federal contract compliance model, but our proposal extends much further by generalizing this obligation into a general duty on all public authorities.

There is, however, one respect in which the implementation of this positive duty has, in our view, been deficient. The emphasis of the various codes of practice issued by the CRE has been on procedures rather than outcomes. Public bodies are expected to monitor, to draw up action plans, and to consult. The overbureaucratic procedures are seen as an end in themselves. Our preferred approach is to place the emphasis on outcomes, creating a duty to ensure fair participation, as in the Northern Ireland Fair Employment legislation and the U.S. contract compliance models. Such a positive duty will ensure, for example, that fair participa-

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FOR THE CENTRE FOR PUBLIC LAW AND JUDGE INSTITUTE OF MANAGEMENT STUDIES, UNIVERSITY OF CAMBRIDGE, 2000).

75. *Id.* at 115.

76. *Id.* at 65.

77. *Id.* at 67.

78. *Id.* at 71.

tion is not subtly transformed into something different, namely a duty to adopt fair procedures. Trust is put in the ability of procedures to produce outcomes, instead of a duty to ensure substantive equality.

### *Reasons for Divergence*

I have tried to show that *Brown* and its progeny—in both legislation and case law—were major stimuli for legal interventions in Britain from the 1960s and (much later) in other parts of Europe. However, specific legal concepts have been or are in the process of being reconstructed to fit the different social and political milieu of European countries.

What accounts for these divergences? There are obvious constitutional differences which explain the form and content of legal decisions. There are also different phases of radical judicial activism. At present, the highest British court is in such an activist phase, as shown by its historic decision on December 16, 2004, that derogations from the ECHR to allow the indefinite detention without trial of suspected foreign terrorists was inconsistent with obligations binding on the U.K. under the ECHR, in part because the powers in question, being directed only at foreigners, were racially discriminatory.<sup>79</sup> The question of discrimination was not, however, one which troubled the U.S. Supreme Court in the Guantanamo Bay cases,<sup>80</sup> which were dealt with on much narrower technical grounds.

There are also more deep-seated reasons for the divergence. One is the profoundly different contexts of racial disadvantage in the two continents. *Brown* has been variously seen by commentators as an attempt to eradicate the legacy of slavery, to overturn compromises on black rights following emancipation, and to strengthen belief in the American system of government as superior to communism. The precise significance of *Brown* in this process remains controversial. Klarman argues that its effect was indirect: it sparked violent protests from southern whites, created social and political instability, and provoked federal government intervention, including the Civil Rights Act of 1964, which was the proximate cause of desegregation,<sup>81</sup> thereby accelerating a social process that was already underway.<sup>82</sup> Badger, on the other hand, persuasively argues that “racial change was imposed on the South as a result of pressure from within, the civil rights movement of African-Americans, and from without, from the federal government.”<sup>83</sup> “In creating that pincer movement on the white South,” he says, “the *Brown* decision, for all its limita-

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79. *A v. Sec’y of State for Home Dep’t* [2005] 2 W.L.R. 87, HL (Eng.).

80. *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004).

81. KLARMAN, *supra* note 22, at 363–4, 463–4.

82. See KLARMAN, *supra* note 22, at 363–64, 463–64; cf. BELL, *supra* note 22, at 69.

83. A. J. Badger, *Brown and Backlash*, in MASSIVE RESISTANCE, SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION (Clive Webb ed., 2005). I am grateful to Professor Badger for allowing me to draw on his paper prior to publication.



tions and for all its misplaced confidence in white southern liberals, was crucial.”<sup>84</sup>

In Britain and the rest of the EU, on the other hand, the primary motivation for antidiscrimination legislation has been seen as a response to immigration from former colonies and increasingly from other developing countries. In the 1960s, removing the right to enter “fortress Britain” was matched by the first Race Relations Acts which aimed to encourage racial integration for those ethnic communities already settled in Britain. Since 2000, the principles of freedom of movement and nondiscrimination against EU citizens within “fortress Europe” have been matched by EU antidiscrimination legislation based on the U.K. model of the 1970s. This was sparked by fears of a far-right racist backlash not only against the settled ethnic minorities, but also against the twenty million Third Country Nationals (TCNs) who fill gaps in the labor market. As I have pointed out elsewhere,<sup>85</sup> there is a contradiction between the political rhetoric of “fortress Europe” and harsh restrictions on migrant workers on the one hand, and the promotion of racial equality on the other, because it undermines the social and civil rights which belong to all human beings, not only to EU citizens.

A second reason for divergence, linked to the first, is that racial classifications tend to be less entrenched in European countries than in the United States. Let me take one recent example. For the past twenty-five years it has been known that Afro-Caribbean boys do much worse at school than boys from other ethnic minorities.<sup>86</sup> They are also three times more likely to be expelled from school for behavioral problems than white children.<sup>87</sup> Many explanations have been offered, including the relatively high proportion of single parent families among Afro-Caribbeans (fifty-two percent are born to single mothers, compared to fourteen percent of whites, and fewer than one in ten Asians<sup>88</sup>). Lacking paternal role models, they latch on to American rappers and give up on schooling.<sup>89</sup> The Chairman of the Commission for Racial Equality, Trevor Phillips, created a furor when he suggested that a solution might be separate classes for black boys and more black teachers.<sup>90</sup> His opponents argue that black boys do badly because they tend to live in bad neighborhoods with bad schools. For example, in the two areas of London with the highest concentration of Afro-Caribbeans, white children do nearly as poorly as black children.<sup>91</sup> The explanation for the poor re-

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84. *Id.*

85. Bob Hepple, *Race and Law in Fortress Europe*, 67 *MOD. L. REV.* 1, 4-7 (2004).

86. *Bad Attitudes: A Misguided Debate Over Black Underachievement at School*, *THE ECONOMIST*, Mar. 12-18, 2005, at 55.

87. *See id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

sults is said to be poverty and location, rather than race. One measure of child poverty is the proportion of children receiving free school meals because their parents are on welfare benefits: the twenty-six percent of Afro-Caribbean children who get these free meals do better at school than the eleven percent of white children who get them.<sup>92</sup> Reforms that are aimed at child poverty are more likely to be acceptable in Britain than ones that are directed simply at racial inequality.

A third reason for divergence is the recognition in Europe of positive social, economic, and cultural obligations on the state. A pluralist approach is also increasingly accepted. Equal treatment of individuals regardless of race or ethnicity is the starting point. But positive *different* treatment is also seen as an essential part of the process of integration. This includes measures that recognize both the cultural diversity of ethnic communities and the fact that some of these communities suffer from collective disadvantage when compared with the dominant communities. There are many differences between European countries on these issues (e.g., the ban on wearing headscarves in French schools compared with the more tolerant British policies). But on the whole, there is a gradual development from the essentially negative rights against racial discrimination to positive obligations on the state to respect, to protect, and to fulfill social rights of citizenship. The crucial difference from the United States is the consensus in Europe that social and cultural rights—not only economic and political ones—should be seen as fundamental in our society. This is reflected in the Charter of Fundamental Rights, a political declaration adopted by the EU Member States in 2000 and incorporated into Part II of the Treaty establishing a European Constitution, signed on October 29, 2004.<sup>93</sup>

### CONCLUSION

In discussing the way in which U.S. models have been reshaped in the European context, I am not suggesting that what Justice Clarence Thomas or Justice Scalia might describe as “foreign moods, fads, or fashions” should, in turn, be imposed on Americans.<sup>94</sup> U.S. models were not imposed on Britain or the rest of Europe. *Brown v. Board of Education*, the Fair Employment statutes, the Civil Rights Act and the Executive Orders stimulated legal scholars, like myself, to suggest ways in which

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92. *See id.*

93. The rejection of the Constitution by the French and Dutch electorates had nothing to do with the Charter, which continues to enjoy wide support, but was due to a number of other factors such as the unpopularity of national governments, proposals to reduce welfare provisions, unemployment, and fears about further enlargement of the EU.

94. *Foster v. State*, 810 So.2d 910 (Fla. 2002), *cert. denied*, 537 U.S. 990 (2002) (Thomas, J., concurring) (criticizing Justice Breyer’s dissent to denial of certiorari); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

British, and later EU law, could make a constructive contribution to the achievement of racial equality.

Our experience is simply an illustration of Alan Watson's truism that "borrowing (with adaptation) has been the usual way of legal development."<sup>95</sup> But Watson notes that "a rule transplanted from one country to another . . . may equally operate to different effect in the two societies, even though it is expressed in apparently similar terms in the two countries."<sup>96</sup> In Teubner's words, to which I referred at the beginning of this article, transplants are "legal irritants." I have tried to show how apparently similar concepts such as disparate treatment and direct discrimination, adverse impact and indirect discrimination, affirmative action, and positive action have been reconstructed in the European context and, in turn, have developed a life of their own. My conclusion is that the differences between U.S. and European equality law will remain and may even increase. But we can all celebrate *Brown v. Board of Education* as a giant step for humanity in the long walk to racial equality.

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95. A. WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 7 (1974).

96. *Id.* at 20.

